JIT KAUR v. PARL SINGH

[O.C.J. (Hashim Yeop A. Sani J.) March 13, 1974]
[Kuala Lumpur — Originating Motion No. 77 of 1972]

Land Law — Caveat — Application to remove caveat — Caveatable interest — Whether respondent entitled to enter caveat — Recognition of equitable interests in land — National Land Code, ss. 323(1) 327(1) and 340.

Evidence Act, 1950, ss. 106 and 114 — Burden of proof — Presumption.

In this case the applicant applied for an order that the caveat lodged by the respondent against certain land in Klang, Selangor, be removed under section 327(1) of the National Land Code. It was alleged that the respondent had no interest in the land and did not have any right to claim title to or any registrable interest in the land. The respondent was a beneficiary of one Gurdial Singh (deceased) who was the original registered proprietor of the land and who had purportedly transferred the land to the applicant. The respondent had taken out letters of administration to the estate of Gurdial Singh and was seeking to challenge the validity of the transfer of the land.

Held: the respondent had shown that he was a person entitled to apply to enter a private caveat under section 323 of the National Land Code and therefore the application to remove the caveat must be dismissed.

Cases referred to:-

(1) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1M.L.J. 145.

(2) *Wilkins & Ors.* v. *Kannammal & Anor.* [1951] M.L.J. 99.

ORIGINATING MOTION.

Morris Edgar for the applicant.

Datuk Athi Nahappan (*G. Davidason* with him) for the respondent.

Hashim Yeop A. Sani J.: This was an application by one Jit Kaur alias Inderjeet Kaur for an order that the caveat lodged by one Parl Singh s/o Gurdial Singh, the respondent, against Land held under C.T. No. 16801, Lot No. 2889, in the Mukim of Bukit Raja, Klang be removed forthwith under section 327(1) of the National Land Code, 1965. The grounds given in the application for the removal were: —

(1) that the respondent has no interest in the land;

(2) that the respondent does not have any right to claim title to or any registrable interest in the land; and

(3) that the caveat was wrongly presented by the respondent.

The respondent however contended that the purported transfer of the land to the applicant was "a sham or an illusory or a fraudulent transfer" allegedly engineered by one Sohan Singh for his own benefit to circumvent or escape the stringent provisions of the Moneylenders Ordinance and other laws. The purported transfer document was signed by the deceased father of the respondent but respondent contended that his father was an illiterate person and did not know that he had transferred the land either to the applicant or any other person. In the Affidavit affirmed on 24th February, 1973 the respondent stated that even after date of the purported transfer his deceased father's conduct in relation to the land was consistent with his still believing that he was the owner of the land since on or about 23rd November, 1970 he issued an option to sell the said land to another person — (copy of Option Agreement Exhibit 'H' in Affidavit). Also stated in the Affidavit was that the deceased father of the respondent continued to collect rents in respect of houses erected on the said land long after the purported transfer to the applicant was made.

At the commencement of the hearing both parties agreed that the later Affidavit of the respondent affirmed on 5th January, 1974 and the report on the valuation of the land be abandoned for the purpose of the application.

The background to this application as can be elicited from the Affidavits and facts admitted during submissions may be summarised as follows. The father of the respondent, one Gurdial Singh, died some time in 1972. A few months later the beneficiaries of the deceased (including the respondent) took steps to obtain Letters of Administration. Six of these beneficiaries were at the time of the hearing still minors. For the purpose of obtaining the Letters of Administration the assets of the deceased had to be ascertained. Their Solicitors made a search but found great difficulty in this regard as the records were destroyed by flood. In the exchange of letters between the Solicitors for the parties it was discovered that the land in question had been transferred to the applicant. The title of the land in question had earlier on been deposited with one Sohan Singh as collateral security for purported loans to the said deceased of $23,000 vide Promissory Note dated 6th January, 1969 (Exhibit "B" in Affidavit of respondent affirmed on 24th February, 1973) and of $15,000 vide Promissory Note dated 15th January, 1970 (Exhibit "C" in the same Affidavit). These Promissory Notes were discovered in the house of the said deceased after his death. There followed an exchange of letters between the Solicitors for both parties and on 12th May, 1972 the respondent filed the caveat against the land. On 21st July, 1972 the respondent alleged that the said Sohan Singh induced respondent and his mother to sign a "renunciation" of their rights in the said land in consideration of a sum of $3,000. A copy of this Acknowledgement Note is in fact an exhibit to the Affidavit of applicant dated 1st December, 1972. Despite this renunciation the respondent refused to remove the caveat. On 18th October, 1972 the respondent alleged further that the said Sohan Singh threatened him to withdraw the caveat or else he would be harmed. The respondent made a report at the Police Station, Klang of this incident and the report is attached as Exhibit "F" in the same Affidavit of the respondent. In the Affidavit of the applicant affirmed on 11th May, 1973 the applicant admitted that in consideration for the transfer a sum of $10,000 was paid to the deceased as expressed in Form 14A (copy of which is attached as Exhibit 'D' in the Affidavit of the applicant affirmed on 7th August, 1973). In fact it was also admitted that the consideration consisted of the two Promissory Notes referred to earlier together with interest on the amounts and a further sum of cash $10,000 paid at the time of the transfer. The transfer was executed at the Land Office, Klang in the presence of Assistant Collector of Land Revenue and the payment of $10,000 was witnessed by one Dato' Lee Eng Teh (see Exhibits "C" and "E" in the Affidavit of the applicant affirmed

on 7th August, 1973). At the time of hearing of the application the respondent had already been granted Letters of Administration and counsel for the respondent also informed the court that the Estate of Gurdial Singh (deceased) will institute an action to challenge the validity of the transfer in question. To show good faith the respondent stated in his Affidavit affirmed on 24th February, 1973 that he was willing to make an application to the Official Administrator to take over the administration of the Estate so as to "expedite the matter and probe into the affairs of the Estate impartially".

The submission by counsel for the respondent sought to establish that the purported transfer of the land was fraudulent on a number of counts. Firstly it was alleged that the consideration was unlawful as it contravened section 24 of the Contracts (Malay States) Ordinance, 1950, and section 8(c) of the Moneylenders Ordinance, 1951. Secondly the document purporting to be the transfer document was not "duly stamped". Therefore this constitutes a fraud on the Government and the instrument was also inadmissible and "shall not be acted upon" under section 52 of the Stamp Ordinance, 1949. On those grounds it was contended that the title of the applicant in the said land is not indefeasible by virtue of section 340(2)(b) of the National Land Code as registration of the title was obtained by means of an "insufficient or void instrument". It was subsequently urged by counsel for the applicant that the fact that the instrument in question was not "duly stamped" does not render it fatal and the court could accept the evidence upon undertaking by the party concerned to have it properly stamped before extracting the order. It was also urged on behalf of the applicant that in respect of the two Promissory Notes found in the house of the deceased father of respondent, the law can be found in section 114 of the Evidence Act (illustration (i)) that is, when a document creating an obligation is in the hands of the obligor the obligation has been discharged. It was finally urged on behalf of the applicant that the court should take cognisance of the renunciation by both respondent and his mother expressed in the Acknowledgement Note dated 21st day of July, 1972. On behalf of the respondent it was urged however that the court should look behind this "renunciation" since bad faith on the part of Sohan Singh was evidenced by the fact that the Acknowledgement Note was signed before another Solicitor different from the Solicitor already retained by the respondent and this was known to Sohan Singh at that time.

This application was made under section 327 of the National Land Code and as stated by Azmi L.P. in the Federal Court judgment in *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh*[1] that section provides for power of the court to make any order in reference to a caveat, which power, would include the power to order removal or otherwise of the caveat. Further on in his judgment at page 146 the learned Lord President said that the trial judge "should have gone further into the matter and decide whether in this case the respondent, the caveator, has satisfied him that he has good grounds for his claim.... In my view therefore, the burden is on the respondent to satisfy the court that he has good grounds for his alleged claim that he had a registrable interest on the land, and all the appellant has to show is that it is the registered proprietor." In the same case Suffian F.J. (as he then was) said in his judgment as follows: —

"Difficulty has been caused by the fact that the National Land Code, which repealed and replaced the old land law, has nothing corresponding to section 170 of the old F.M.S. Land Code (Cap. 138) which clearly stated that the caveator must show cause why his caveat should not be withdrawn. The National Land Code is completely silent on the subject. The learned judge decided that he must presume that the caveat registered was proper and valid unless he was persuaded to the contrary, that it was for the proprietor to prove that the caveator was not one of the persons specified in section 323 of the Code, and there being no material placed before him to support the proprietor's application, he dismissed it....

I am of the opinion that it is for the caveator to satisfy the court that it is just for the caveat to remain. I say so because, first, as between the proprietor and the caveator, the proprietor is in a superior position; secondly, because the fact that the caveat has been entered on the register does not necessarily mean that the caveator's claim to restrain the proprietor's dealings with the land is necessarily valid in view of subsection (1) of section 324.

Thirdly, the fact that the express provision of section 170 of the old F.M.S. Land Code (providing that it is for the caveator to show cause why the caveat should not be withdrawn) has not been repeated in the National Land Code, does not in my judgment justify the inference that the legislature intended to change the law — because there still remains section 106 of the Evidence Ordinance which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The respondent here may enter a caveat if, and only if, in the words of paragraph (a) of subsection (1) of section 323 he is a 'person or body claiming title to, or any registrable interest, in any alienated land or any right to such title or interest', and I am of the opinion that his caveat may remain on the register only if he is such a person or body."

At the conclusion of the hearing in the instant case counsel for the applicant had in my view successfully replied to the points raised by respondent in regard to section 52 of the Stamp Ordinance, 1949. But to my mind in this Motion to succeed the respondent must show to the court —

(i) that he falls under any of the categories of persons mentioned in section 323(1) of the National Land Code; and

(ii) that there are circumstances to justify the court to make an order that the caveat may not at least for the time being be removed under section 327 (1) of the Code.

It has been accepted that our courts will always recognise equitable interests in land and this is not inconsistent with our National Land Code. Taylor J. in *Wilkins & Others* v. *Kannammal & Anor*[2] said: —

"... The Torrens system is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects."

S. K. Das on the Torrens System in Malaya said at page 189 —

"In the absence of any special provision to the contrary equitable and contractual rights under the general law are entitled to recognition and protection and, if the remedy granted by way of specific relief does not *ex facie* create an interest in contravention of the Code, the order declaring such right against the land has the same validity as a registrable instrument *inter partes*. This is important for no right, which is incapable of conferring a registrable interest in land recognised by the Code, is capable of registration or of being protected by caveat."

The test to be applied in regard to the respondent's right to enter the caveat can be found also in *S. K. Das, supra,* at page 324 which reads as follows: —

"The primary test for a caveatable interest may be put on an alternative basis: is the right of the person lodging a caveat capable (i) of specific performance or (ii) of being protected by an interim injunction? 'The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the court'. Richmond, J. said to the caveator's counsel in *In re Kauri Timber Co.* 'You have not *jus in re.* The question is whether, because you might have an injunction against a sale, you may therefore lodge a caveat'."

On the purpose of a caveat the learned author at page 325 said: —

"It enables the caveator to retain the matter *in statu quo* until his claim is adjudicated upon by the court and serves as a notice to the world at large of an outstanding equitable claim. The lodging of a caveat is really in the nature of the initiation of litigation, and only those persons should be entitled to initiate litigation who are entitled to litigate the matter of the dispute which is set up by the caveat, *Municipal District of Concord* v. *Coles* (1905) 3 C.L.R. 96 at p. 108."

The respondent is one of the beneficiaries of Gurdial Singh s/o Cherah Singh. See also his Statutory Declaration in respect of his application to enter the caveat — (Exhibit 'A' in Affidavit affirmed on 24th February, 1973). He is at the moment also one of the holders of Letters of Administration of the Estate of the said Gurdial Singh s/o Cherah Singh (deceased) and is seeking to challenge the validity of transfer of this land. The respondent is in my view a person entitled to apply to enter a private caveat under section 323(1) of the National Land Code.

Section 327(1) of the National Land Code empowers the court to make such order as it may think just. In an application of this nature the learned author of the Torrens System in Malaya said at page 347-348 of his book as follows: —

"In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loth to prevent parties litigating any right that they think they may possess: *In re Caveat of Lewis* (1903) 23 N.Z.L.R. S.C. 581. Where there is a conflict of testimony the caveat will not be discharged."

On the facts and circumstances of this case therefore I dismissed the application to remove the caveat and further ordered the respondent to file the main action within six months from the date of the order.

Application dismissed.

Solicitors: *Inderjit Singh; Athi Nahappan & Co.*

APPOO s/o KRISHNAN v. ELLAMAH d/o RAMASAMY

[O.C.J. (Mohamad Azmi J.) May 14, 1974]
[Kuala Lumpur — Civil Suit No. 838 of 1966]

Land Law — Agreement relating to land — Whether sale agreement or moneylending transaction — Assignment of land registered — Whether title indefeasible — Fraud — Assignment obtained by insufficient or void instrument — Decision by Collector of Land Revenue — Conditional order — Failure to appeal not a bar — Moneylenders Ordinance, 1951, s. 16 — Land Code (F.M.S. Cap. 138), s. 42 and 237.

In this case the plaintiff had made an agreement with the defendant's husband, since deceased, whereby he acknowledged the receipt of $2,500 from the deceased and agreed to execute a power of attorney for the transfer of the land belonging to him to the deceased. It was also agreed that if the sum of $2,500 was repaid before a prescribed date then the application for transfer will be withdrawn or if the land has been transferred it will be retransferred to the plaintiff. Subsequently the deceased succeeded in registering the transfer of the land to him. It was alleged by the plaintiff that the agreement was a moneylender's transaction and that the registration of the transfer was obtained by fraud and by means of an insufficient or void instrument. The defendant on the other hand alleged that the agreement was an agreement for sale, subject to the condition for repayment which the plaintiff had failed to comply with, and therefore the deceased's title was indefeasible.

Held: (1) the agreement in this case was a loan transaction on the security of the land and the transaction was a moneylending transaction and as the agreement was insufficient to constitute a note or memorandum within the meaning of section 16 of the Moneylenders Ordinance, it was therefore unenforceable by reason of illegality;

(2) in this case the plaintiff has proved fraud and misrepresentation on the part of the deceased and that the assignment to the deceased was obtained by means of an insufficient or void instrument, and therefore the deceased's title to the land was not indefeasible, although it was registered in the deceased's name;

(3) the Collector of Land Revenue had not made a final decision against the plaintiff in this matter and as the collector's order was conditional in nature the fact that the plaintiff had not appealed against the decision under section 237 of the Land Code is not fatal to his cause of action in this case.

Cases referred to:-

(1) *Kho Kuang Choon* v. *Phuman Singh* [1965] 2 M.L.J. 189; [1968] 1 M.L.J. 183.

(2) *Subramaniam* v. *Muthiah Chetty* [1934] M.L.J. 222.

(3) *Sundram* v. *Chew Choon Khoon* [1968] 1 M.L.J. 90.

(4) *Wong See Teng* v. *Saraswathy Ammal* [1954] M.L.J. 141.

The following cases were also cited in argument: *Anduvan* v. *Thong Nyik Lin* [1966] 1 M.L.J. 57, *Kemsley* v. *Foot & Ors.* [1951] K.B. 34, *Mahni* v. *Ali & Anor.* [1965] 1 M.L.J. 234, *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105 C.A., *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.* [1969] 2 M.L.J. 8, *Clay* v. *Rufford* (1850) 19 L.J. 295, *Ponnusamy & Anor.* v. *Nathu Ram* (1959) 3 M.C. 260, *Kiong Man* v. *Kishen* [1971] 1 M.L.J. 54, *Gallie* v. *Lee & Anor.* [1969] 1 All E.R. 1062 C.A., *Assets Company Limited* v. *Mere Roihi* [1905] A.C. 176, *In re Monolithic Building Co.* [1915] 1 Ch. 643, *Malaya Borneo Building Society Ltd.* v. *M. Ramachandran* [1959] M.L.J. 182 C.A., *Tueh Guat Choo* v. *Cheah Ah Hoe & Anor.* [1932] M.L.J. 109, *Ratan Singh* v. *Tan Teng Luan & Anor.* [1963] M.L.J. 116, *Periasamy* v. *Public Prosecutor* [1966] 1 M.L.J. 138 F.C., *White & Ors.* v. *Kuzych* [1951] A.C. 585, *Tharmalingam* v. *Sambanthan* [1960] M.L.J. 257, *Kolandaisamy* v. *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 M.L.J. 222, *Akbar Khan* v. *Attar Singh* [1936] 2 All E.R. 545, *Ramasamy* v. *Suppiah* [1969] 2 M.L.J. 187.

CIVIL SUIT.

S. A. Raj for the plaintiff.